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THE INTERPRETATION OF THE UNIFORM COMMERCIAL CODE: ARTICLE 9 IN THE BANKRUPTCY COURTS

RAY D. HENSON*

No doubt there are certain canons of statutory construction which are being taught in law schools and which, when thought to be useful, are even mentioned by courts. But for various reasons, we may approach the proper interpretation of the Uniform Commercial Code as a somewhat new—since it is impossible to have anything completely new in law—proposition to be examined. The matter of how to approach the theoretically proper solution to a problem is quite closely allied with what is in fact being done in this field, and the propriety of the “is” must be weighed against the balance of the “ought.”

I

A re-examination of some standard jurisprudential guides to legal interpretation¹ reinforces a pre-existing belief that there are no guides of any genuine importance. Certain old maxims are still occasionally paraded in opinions,² but it is evident that they are simply thrown in as buttresses and have in no way been relied upon as significant aids to interpretation.

Part of the difficulty with canons of construction is an attempt to generalize them. As Mr. Justice Holmes was fond of pointing out, the chief end of man may be to frame general propositions, but no general proposition is worth a damn.³ Certain canons have a degree of validity in some cases but not in all. For example, looking for the “intent of the legislature”⁴ is clearly appropriate in construing acts where the

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1. See, e.g., E. BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW*, 347-386, (1962); B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, (1921); W. FRIEDMAN, *LEGAL THEORY* 401-464, (4th ed. 1960); J. GRAY, *THE NATURE AND SOURCES OF THE LAW*, (2d ed. 1921); D. LLOYD, *INTRODUCTION TO JURISPRUDENCE*, 386-406 (1959); J. SALMOND, *JURISPRUDENCE*, 151-161, (11th ed., G. Williams ed. 1957). See also C. FIFOOT, *JUDGE AND JURIST IN THE REIGN OF QUEEN VICTORIA*, 129-133 (1959). Compare, J. FRANK, *COURTS ON TRIAL* 292-309, (1949); L. HAND, *THE SPIRIT OF LIBERTY* 103-110 (1960); K. LLEWELLYN, *THE BRAMBLE BUSH*, 70-91, (1951); K. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE*, (1962); A. ROSS, *ON LAW AND JUSTICE*, 75-169, (1959); E. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 421-425, 559-594, (1953).

2. See, e.g., “expressio unius est exclusio alterius” in *Biddle v. State Beverage Dept.*, 187 So.2d 65, 67 (Fla. 4th Dist. 1966); *Steinfeld v. Jefferson County Fiscal Court*, 312 Ky. 614, 616, 229 S.W.2d 319, 320 (Ct. App. 1950); *Cf. Dick v. Roberts*, 8 Ill. 2d 215, 218, 133 N.E.2d 305, 308 (1956); *Galloway v. Truesdell*, 422 P.2d 237, 246 (Nev. 1967).

3. See, e.g., 1 *Holmes—Pollock Letters* 118; *id.* Vol. 2 at 13, 59 (Howe ed., 2d ed. 1961).

4. In determining whether section 10 of the Uniform Trust Receipts Act created a lien or a priority, a distinguished federal court stated: “The legislative interest is crystal clear.” *In re Crosstown Motors, Inc.*, 272 F.2d 224, 226 (7th Cir. 1959), *cert. denied sub nom.* Commercial

legislature had a very obvious reason for passing a bill, but it is absurd to think that any legislature had any intent whatsoever as to an obscure point covered by the Uniform Commercial Code. An enacting legislature clearly intended to pass the Code in the form in which it was enacted and, except where local variations were made, it meant for an act sponsored by the National Conference of Commissioners on Uniform State Laws and the American Law Institute to be interpreted as the act itself specified, with the aid of the Official Comments.⁵ Enactment was an act of faith: faith in the Code's sponsors and what they were trying to do.

Whether we choose to admit it or not, it is impossible to explain how we understand and interpret law. There is no dearth of explanations, but as serious efforts to understand mental processes, they can be little more than failures with occasionally stimulating but often limited appeal.⁶

Credit Corp. v. Allen, 363 U.S. 811 (1960). (That is, the use of the word "priority" foreclosed further thought.) Since the UTRA was, and was always conceded to be, exceedingly difficult to understand, it seems most probable that when the Illinois General Assembly passed that act in 1935 no thought at all was given to the question at issue. Indeed, the Illinois legislature would have been most prescient had it, in 1935, anticipated the famous 1938 amendments to the Bankruptcy Act which precipitated the *Crosstown* problem. It is very likely that most instances of judicial reliance on legislative intent are as inapposite as the reliance in *Crosstown*. According to Mr. Justice Holmes, "We do not inquire what the legislature meant; we ask only what the statute means." O. HOLMES, *The Theory of Legal Interpretation*, COLLECTED LEGAL PAPERS 203, 207 (1920).

5. The use of the term "Official Comments" may be questioned, but it seems appropriate to describe those comments drafted by the Code's sponsors which appear with Official Text of the Code, and it distinguishes them from the local comments which appear in the annotated statutes of the various Code states. *But see* Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 Wis. L. Rev. 597.

6. This statement is believed to be true, and it is made after a number of personal ventures into the field. But the fact that a question cannot be answered in a scientific sense does not necessarily mean that such a question should not be asked. We can sometimes learn much by exploring the unknowable. However, it helps if we understand the problems involved in communication or else we may think that we are answering questions when they have no particular answers. These problems are not peculiar to law. In fact, lawyers have contributed very little of any importance to the understanding of "meaning," although the problem is of singular significance to law. Some books of general value are: J. AUSTIN, *Philosophical Papers* (J. Urmson and G. Warnock eds. 1961); A. AYER, *Philosophy and Language* (1960); P. BRIDGMAN, *The Logic of Modern Physics* (1927); R. BROWN, *Words and Things* (1958); R. CARNAP, *The Logical Syntax of Language* (1937); W. JOHNSON, *People in Quandaries* (1940); S. HAYAKAWA, *Language in Thought and Action* (1949); A. KORZYBSKI, *Science and Sanity* (4th ed. 1958); S. LANGER, *An Introduction to Symbolic Logic* (2d ed. 1953); A. LEVI, *Philosophy in the Modern World* (1959); G. MOORE, *Some Main Problems of Philosophy* (1953); C. MORRIS, *Signs, Language and Behavior* (1955); C. OGDEN and I. RICHARDS, *The Meaning of Meaning* (8th ed. 1946); W. QUINE, *From a Logical Point of View* (1953); B. RUSSELL, *Human Knowledge: Its Scope and Limits* (1948); G. RYLE, *Dilemmas* (1956); G. RYLE, *The Concept of Mind*, (1949); P. STRAWSON, *Individuals* (1959); H. WEINBERG, *Levels of Knowing and Existence* (1959); A. WHITEHEAD, *Symbolism, Its Meaning and Effect* (1927); L. WITTGENSTEIN, *Philosophical Investigations* (Anscombe trans. 1953); L. WITTGENSTEIN, *Tractatus Logico-Philosophicus* (1922). As may be obvious from the titles, these books explore different routes toward somewhat similar goals.

If we are trained to believe that "statutes in derogation of the common law must be strictly construed," it may be difficult to realize that this is merely an enshrined remark which may have been pertinent in explaining one result once, but which has in fact no validity at all. It would be exceedingly undemocratic and even arrogant to think that this canon had any real basis; it is just the opposite of the proper judicial attitude. It is a cliché which is used as a substitute for thinking and no more than that.

Law without language is inconceivable, and statutes are of course written language. The important words carry a certain amount of freight with them, for we are accustomed to using certain words in certain ways. We respond to them more or less automatically. For that reason it was a step forward when, for instance, "conditional sale" and "chattel mortgage" were abandoned in favor of "secured transaction."⁷ New terms encourage fresh thinking, but there are limits beyond which even new terms become impractical. To encourage uniformity in interpretation, the defined terms in the Code must be carefully studied. Some circularity is unavoidable even in a dictionary and, of course, not every term is defined in the Code. A criticism frequently encountered is that certain concepts such as "commercially reasonable" are not defined; but the critics have apparently never tried to imagine a definition of such concepts, for they are undefinable except by giving selective examples of conduct which does or does not conform.⁸ The law is full of such concepts: justice, due process, equitable, fair comment, valid. Such concepts, even though not definable in a significant sense, can ordinarily be applied in a factual context, and they then become meaningful.

But even words which are cogently defined are not significant in isolation. It is their use in a sentence, and ultimately in the broader act, that makes them meaningful. On the basis of knowledge and experience and fresh study brought to bear on a given statutory provision, we can see if it applies or how it applies in a given factual context.

When we interpret the Code, we must remember that it is *not* a

7. Article 9's abolition of the distinction between "title" and "lien" had to go to the Court of Appeals for the Second Circuit for a vindication. See *In re Yale Express System, Inc.* 370 F.2d 433 (2d Cir. 1966).

We would indeed be myopic if we failed to recognize the revolution in commercial law that the Uniform Commercial Code has occasioned in the states. It would be incongruous for the federal courts, historically the leaders in the development of the law, to continue to employ anachronistic distinctions to determine whether a creditor is entitled to redeem property held by the trustee when the overwhelming number of states have succeeded in bringing their laws more into line with commercial reality.

Id. at 437 (Kaufman, J.).

8. See § 9-507(2) for examples of what is "commercially reasonable." Another undefined term is "new value," of which examples are given in § 9-108. All section references not otherwise identified are to the current Official Text of the Uniform Commercial Code.

constitution that we are expounding.⁹ For obvious reasons, the English have been deeply concerned with statutory interpretation, while we have been principally preoccupied with constitutional interpretation. But if the problems are not the same, they are not totally dissimilar.

While it is difficult to change the Constitution by amendment, it is also difficult to secure uniform enactment of officially sponsored amendments to uniform legislation.¹⁰ In fact, it seems to be impossibly difficult to secure the uniform enactment of a uniform act in the first place.¹¹

II

The Code contains express provisions on its own interpretation. Section 1-102 provides:

- (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
- (2) Underlying purposes and policies of this Act are
 - (a) to simplify, clarify and modernize the law governing commercial transactions;
 - (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
 - (c) to make uniform the law among the various jurisdictions.

This command from the enacting legislature is entitled to complete acceptance, recognition and enforcement by every court.¹² The personal

9. Chief Justice Marshall's famous expression, "[I]t is a constitution we are expounding," *M Cullough v. Maryland*, 4 Wheat. 316, 407 (1819), was often referred to by Mr. Justice Frankfurter. See, e.g., Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 218 (1955) in F. FRANKFURTER, OF LAW AND MEN 3, 5 (1956); F. FRANKFURTER, with Phillips, FELIX FRANKFURTER REMINISCES 166 (1960); F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 28 (1938). No one since the great days of Mr. Justice Holmes has written as perceptively on statutory construction as Mr. Justice Frankfurter. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947). See also Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in FELIX FRANKFURTER: THE JUDGE (W. Mendelson ed. 1964).

10. Since no prior uniform acts were kept up-to-date by officially sponsored amendments, our experience is limited.

11. As of November, 1966, there were 337 non-uniform amendments to various sections of art. 9; 47 of the 54 sections have been non-uniformly amended, some by as many as thirty states. This appalling situation contributed to the appointment of a special Review Committee to restudy article 9 in depth. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REP. NO. 3 X-XI (1967). While we hope the experience will not be repeated, in times past uniform acts have been warped by divergent judicial interpretations as well as by unofficial amendments. Eighty sections of the NIL had different interpretations in different states as a result of conflicting court decisions. Malcolm, *General Background, Concepts, and Coverage of the Uniform Commercial Code* in THE ILLINOIS UNIFORM COMMERCIAL CODE 4, 5 (1962).

12. See Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L. F. 291. Compare Hicks, *Uniformity of the Commercial Code*, 8 B.C. IND. & COM L. REV. 568 (1967).

predilections of a particular judge are not properly part of the interpretative process.

It is the legislature's function to reflect the will of the people through enactments, and it is the courts' function to properly interpret and enforce what the legislature has enacted except where constitutional inhibitions prohibit such action.

Is there any reason why the Code should not "be liberally construed and applied to promote its underlying purposes and policies?" There is none. If the legislature so commands, the courts must obey. There is no excuse—certainly no reason—for doing anything else.

Commerce is moving faster than ever before. There is no reason why commercial law should lag behind. The Code achieved its object of simplifying, clarifying and modernizing the law as of the time of its promulgation, but the courts must assist in permitting "the continued expansion of commercial practices" in such fields as bank credit cards, which were unknown twenty years ago. The Code provides the basic mechanism for credit cards, but the parts were not geared to handle this product, although the agreements of the parties should be given a decent scope in which to operate within commercially reasonable limits.¹³

The purpose of making the law uniform can only be understood to mean: making the law uniformly correct within the aims and purposes of the Code's sponsors. It would be absurd to suggest that if the first decision on a particular point were clearly wrong, every later court should follow that holding in order to make the law's interpretation uniform. Insofar as the Code's provisions themselves are uniform throughout the country, as about half of them are,¹⁴ it is understandable that some courts will differ as to interpretation; and it is somewhat misleading to suggest that a holding of the Orphan's Court of Allendale or a referee in Portland—or indeed any court other than the United States Supreme Court—determines the interpretation of a law for any broader area than the court's limited jurisdiction or, within limits, for parties other than those before the court in the case decided. Courts change interpretations; even dissents sometimes become the law. A decision has precedential value for other jurisdictions only when it meets acceptable criteria of quality.

It is important to note a third provision of section 1-102:

13. See Davenport, *Bank Credit Cards and the Uniform Commercial Code*, 1 VAL. U.L. REV. 218 (1967).

14. As of November, 1966, there were about 750 non-uniform amendments among the 49 jurisdictions which had then enacted the Code. Of the Code's 399 sections, 195 had not been amended by any state and 76 sections were amended by only a single state. See Schnader, *The Uniform Commercial Code—Today and Tomorrow*, 22 BUS. LAW 229, 230-31 (1966). Of course, it must be remembered that many amendments to the Code are trivial (and inexcusable for that reason) and others were thought necessary to meet purely local problems.

(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

And a fourth:

(4) The presence in certain provisions of this Act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

While these provisions insure judicial scrutiny of what the parties do—actually the parties' agreement is probably evidenced by contracts of adhesion in most cases—by imposing a standard of "manifestly unreasonable," there is room for some play in the joints. An over-reaching secured party cannot extract the last drop of the debtor's blood just by getting his signature on an agreement,¹⁵ but the parties may agree on rather routine points, such as how many days' notice must be given after default under a security agreement and before a sale of the collateral.¹⁶

It is to be hoped that the offer of the Permanent Editorial Board to provide, if requested, *amicus* briefs in cases at the appellate level will be accepted in those instances where the proper interpretation of the Code may be doubtful or a conflict of policy, as between the Code and the Bankruptcy Act, may be thought to exist.¹⁷ But what if a court requests an *amicus* brief and then does not accept the Board's views?¹⁸ The

15. It was clearly improper for a referee in bankruptcy to transport the doctrine of unconscionability, as applied to sales transactions in § 2-302, into secured transactions not arising out of sales and governed by art. 9. See *In re Dorset Steel Equipment Co.*, 2 UCC Rep. Serv. 1016 (E.D. Pa. 1965) and *In re Elkins-Dell Manufacturing Co.*, 2 UCC Rep. Serv. 1021 (E.D. Pa. 1965), both vacated and remanded, 243 F. Supp. 864 (E.D. Pa. 1966) (The district judge expressly declined to find § 2-302 applicable to agreements other than sales contracts. He did, however, recognize an independent doctrine of unconscionability which, on a proper factual determination, would be a legitimate reason for disallowing a claim in bankruptcy). See also *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964).

16. See § 9-504(3). While rarely acknowledged, much commercial law is purely a matter of private contract.

17. As of November, 1966, only two requests for briefs *amici curiae* had been received by the Board. See Dezendorf, *How the Code's Permanent Editorial Board is Functioning*, 22 Bus. L. 227, 228 (1966). Several courts have, however, had the benefit of *amicus* briefs by the Commissioners on Uniform State Laws for the states involved. See, e.g., *National Cash Register Co. v. Firestone & Co.*, 346 Mass. 255, 256, 191 N.E.2d 471, 472 (1963); *Norton v. National Bank of Commerce*, 240 Ark. 143, 144, 398 S.W.2d 538, 539 (1966).

18. In a sense this happened in *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966), where the Supreme Court of Arkansas requested an *amicus* brief from Joe C. Barrett, Esq., a Commissioner on Uniform State Laws from Arkansas, and Mr. Barrett was assisted by the Permanent Editorial Board in the preparation of his brief. 240 Ark. at 144, 398 S.W.2d at 539. According to one commentator, "[I]t seems clear

chances are that the court's interpretation of the Code will be erroneous and that other courts will not, like the Internal Revenue Service on occasion, "acquiesce."

III

The litigation under article 9 has produced few examples of the *outré*, except for a certain number of decisions coming out of the bankruptcy courts. At the appellate level, most opinions reflect an awareness of the value of the Code, the work that went in to it, the continuing efforts of its sponsors to keep it up-to-date and uniform, and a genuine desire to interpret the Code as its sponsors think it should be interpreted.¹⁹

While the importance of bankruptcy courts as a testing ground for the Code's secured transactions can be overemphasized, it is nonetheless inescapably true that if a secured transaction is involved in a bankruptcy proceeding, the transaction must be enforced or the collateral is lost to the secured party. The overwhelming number of secured transactions will be retired in accordance with the contracts involved; if the situation were otherwise, our economy would collapse. But when a debtor goes into bankruptcy, if the secured party cannot enforce his right to the collateral, the terms of the agreement between the parties are then rewritten at the worst possible time, from the secured party's point of view. Where the secured party has made an improper filing, aside from situations where the error was mechanical, trivial, and not really misleading to third parties, then we need not be especially concerned with his fate.²⁰ If he has given proper notice to the world of his interest in the collateral and the transaction is then not enforced, our concern takes on another dimension.

What happens in fact in bankruptcy courts is of the highest importance to secured creditors. It is also impossible to determine in detail. We know isolated instances, but we do not know, we cannot know, how

that this case should not be followed by the next court to consider the problem." Ambrosini, *Debtor's Right to Notice Upon Disposition of Collateral*, 8 B.C. IND. & COM. L. REV. 267, 272 (1967).

19. See, e.g., *In re Yale Express Systems, Inc.*, 370 F.2d 433, 436 n.2 (2d Cir. 1966) (Kaufman, J.); *United States v. Wegematic Corp.*, 360 F.2d 674, 676 (2d Cir. 1966) (Friendly, J.); *In re Excel Stores, Inc.*, 341 F.2d 961, 963 (2d Cir. 1965) (Medina, J.); *Appeals of General Electric Co.*, 73 I.D. 95, 3 UCC Rep. Serv. 510 (U.S. Dept. of Int., Board of Contract Appeals, 1966); *Appeal of Productions Unlimited, Inc.*, VACAB—541, 3 UCC Rep. Serv. 620 (Veterans Administration Contract Appeals Board, 1966). On the background of the Code, see Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958); Malcolm, *The Uniform Commercial Code in the United States*, 12 INT'L & COMP. L. Q. 226 (1963) in ABA, *Uniform Commercial Code Handbook* 1 (1964); Schnader, *Pennsylvania and the Uniform Commercial Code*, 37 TEMP. L. Q. 265 (1964).

20. There have been far too many cases involving obviously improper filings. See, e.g., *In re Advertising Distributors of America, Inc.*, 2 UCC Rep. Serv. 548 (N.D. Ohio 1965) (in bankruptcy); *In re Causer's Town & Country Super Market, Inc.*, 2 UCC Rep. Serv. 541 (N.D. Ohio 1965); *In re Falkof*, 2 UCC Rep. Serv. 731 (D. Mass. 1963).

every case is handled. Indeed, such a mass of material would be unassimilable. Referees' decisions are not officially reported, but enough Code cases are unofficially reported to give us an insight into how solutions are approached at this level. (No one could seriously recommend reporting all referees' or other trial judges' decisions because, aside from unmanageable volume, reported opinions of trial courts are often perfunctory, not necessarily well reasoned, and of little or no precedential value when the courts are below the level of the federal district courts.) Digests of some referees' opinions also appear in the Journal of National Conference of Referees in Bankruptcy, and the opinions included compared with those omitted furnish an interesting field of speculation.

On the basis of referees' opinions available for study, we know that some referees are sympathetic to the aims of the Code or that, in any event, they see it as their duty to enforce secured transactions properly handled in accordance with state law. We also know that a considerable number of referees are not sympathetic to the Code or to secured credit in general, and that they will find some basis for setting aside almost any secured transaction that comes before them.²¹ We cannot know how many secured transactions have been compromised in bankruptcy because so little was involved that the attorneys for the secured party have felt the only practical answer was to accept a percentage of the value of the collateral rather than spend the time and money required for a review to secure the proper result; that such compromises are, in a sense, forced on secured parties is not open to serious doubt, although the proposition cannot be proved by objective evidence.

Almost every opinion by Referee Hiller of Reading, Pennsylvania, will be completely in line with the aims of the Code. It is fortunate that such a distinguished referee was available to decide so many of the earliest cases involving the Code's secured transactions in bankruptcy. Nor does he stand alone. It is, however, the other side of the coin that requires examination, and many instances of what appear to be clearly erroneous decisions by referees can be known only by reading opinions reversing the referees on review.

A Pennsylvania case involved the following description of collateral:²²

[I]nventory of merchandise to be maintained in an amount not less than \$10,000, as per agreement of sale, at seller's wholesale cost, contained in the Kiddy and Women's Wear Shop

21. Readers of E. BERNE, *GAMES PEOPLE PLAY* (1964), might suggest that some referees play a game called Kick the Code, or I'll Have The Last Word (Most of The Time) No Matter What You Think.

22. *In re Goodfriend*, CCH Inst. Cred. Guide ¶ 98,977 at 89,436 (E.D. Pa. 1964).

The District Court reversed the referee who had held this description insufficient under section 9-203(1)(b), which simply requires that, for a security interest to be enforceable against the debtor or third parties, the debtor must have signed a security agreement which contains a description of the collateral. (Note that the issue was, strangely enough, the sufficiency of description in the security agreement, not the description in the financing statement, and, despite the fact that the collateral was inventory and therefore presumably changing, the issue of a preference was not raised as to collateral coming in within four months of bankruptcy.) It is difficult to see how the description could have been more precise in any meaningful way. Where a security interest is taken in everything properly classified as inventory and located at an identified place of business of the debtor, third parties are surely given as much significant information if "inventory of merchandise" is claimed rather than a listing of possible kinds of inventory followed by a catch-all phrase. As the court pointed out, "the natural and normal meaning of the quoted language is that a lien is created on the whole inventory"²³

A Missouri case involved a numismatist's inventory of United States coins which were pledged to secure a bank debt. The referee held that these rare coins were money, that money was not "goods, instruments, negotiable documents, or chattel paper" in which a security interest, under section 9-305, may be perfected by pledge, that the only means of perfecting a security interest in rare coins was by filing a financing statement, and that in the absence of filing the security interest was unperfected. The district court reached a different result, reversing the referee.²⁴ It is obvious that a filed financing statement covering rare, though spendable, coins would be meaningless; it would be of even less value to third parties than a filed financing statement covering a promissory note.²⁵ The problem involved in the case was solved on a common sense basis by the district judge, who reached the only conceivable result, in upholding the security interest in the pledged coins.

The Court of Appeals for the Second Circuit, in an excellent opinion by Judge Waterman, affirming both the district judge and the referee, decided that where a secured party failed to subscribe a financing statement manually, the filing was effective nonetheless on the ground that the typed name in the body of the statement, coupled with the subsequent act of filing, was an authentication.²⁶ Reliance was placed on the

23. *Id.*

24. *In re Midas Coin Company, Inc.*, 264 F. Supp. 193 (E.D. Mo. 1967). See also *In re Atlanta Times, Inc.*, 3 UCC Rep. Serv. 893 (N.D. Ga. 1966) (in bankruptcy).

25. Under § 9-304(1), a security interest in instruments (other than instruments constituting part of chattel paper) can be perfected only by taking possession, except for instances of 21-day temporarily perfected security interests.

26. *Benedict v. Lebowitz*, 346 F.2d 120 (2d Cir. 1965).

definition of "signed" in section 1-201(39) and the Official Comment explicating this section, as well as on the direction for liberal construction in section 1-102, and the concept of substantial compliance in section 9-402(5). Once this statement was filed, with the chattel mortgage attached, no third party could have been misled for, with or without a manual signature by the secured party, the statement was genuine.²⁷ Nevertheless, this holding was specifically said to be "unacceptable"²⁸ to a referee in Maine, and on similar facts a security interest was invalidated. This opinion by Referee Cyr was reported in full in the Journal of the National Association of Referees in Bankruptcy,²⁹ but another opinion dated the following day was not mentioned in the Journal. In this latter case, Referee Cyr decided that a financing statement was properly signed by the secured party where its corporate name and address appeared in the proper place but the corporate name was not shown in the place for signature; the statement was manually signed by the corporation's manager, although his capacity was not shown.³⁰ There is no difference between the cases of any significance to third parties,³¹ and the second result is proper; yet it is interesting to note which opinion received the publicity accorded by appearance in the referees' magazine.

Cases involving chattel leases in bankruptcy can be found to support practically any proposition that is moderately germane to the subject. It is true that the Code does not set out definitive criteria to determine whether a "lease" is a so-called true lease or a disguised conditional sale, but by its terms article 9 applies only to leases intended as security.³² Section 1-201(37), in defining "security interest," stipulates:

Whether a lease is intended as security is to be determined by the facts of each case; however (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

Suppose we have a chattel lease where 75% of the rentals paid could be applied toward the purchase price to the extent of not more than 75% of the price; that is, in any event at least 25% of the purchase price would have to be paid to exercise the purchase option. Does such a lease create a security interest? Did the parties *intend* to create a

27. *Accord*, In re McCroskey, 4 UCC Rep. Serv. 237 (S.D. Ohio 1966) (in bankruptcy).

28. In re Carlstrom, CCH Inst. Cred. Guide ¶ 98,251 at 88,892 (D. Maine 1966) (in bankruptcy).

29. 41 Ref. J. 22 (1967).

30. In re Turcotte, CCH Inst. Cred. Guide ¶ 98,252 (D. Maine 1966) (in bankruptcy).

31. See Squillante, *Commercial Code Review*, 72 Com. L.J. 153 (1967).

32. § 9-102(2).

security interest? If we follow, as we must, the legislative criteria, then it is difficult to see how the lease could be held to be anything but a straight lease, since 25% of the purchase price is not nominal by any standard, and in fact was \$2,006.25 in *In re Wheatland Electric Products Co.*,³³ where initially the referee refused the lessor's right of reclamation, apparently on the ground that there was a security interest invalid for want of filing; the district court reversed. One wonders how the question could even have been considered, since the various leases containing options to purchase had all terminated some months before bankruptcy, and the lease in existence at that time contained no purchase option of any kind; nor was the rent nominal. However, even the most ordinary kind of lease may be held to be a secured transaction in bankruptcy even though it contains no option to purchase but is replete with those covenants required of a lessee when a lessor must, as is normally the case, finance the lease.³⁴ This disregard of state law may be due to a variety of factors, including a lack of knowledge of how commercial leasing transactions are negotiated, underwritten, and financed. Nevertheless, it seems fundamental that if every lease must be filed as a secured transaction to be valid in bankruptcy, such a result should be based on some law requiring it; there is none at this time.

If a debtor's purchase of an automobile is financed by a lender and the automobile is destroyed within four months of bankruptcy, will the lender's claim to insurance proceeds be a voidable preference so far as antecedent debt is concerned? On somewhat more complicated facts, it has been so held in bankruptcy.³⁵ To the uninitiated it might seem that unsecured creditors would be in the same position whether the financier's claim is to the automobile or to the insurance proceeds which stand in its place.³⁶ It might be looked upon simply as another instance of substituted collateral. Not so.

33. 237 F. Supp. 820 (W.D. Pa. 1964).

34. *In re Transcontinental Industries, Inc.*, 3 UCC Rep. Serv. 235 (N.D. Ga. 1965) (in bankruptcy). Compare *In re Atlanta Times, Inc.*, 3 UCC Rep. Serv. 893 (N.D. Ga. 1966) (in bankruptcy), *petition for review denied*, 259 F. Supp. 820 (1966).

35. *In re Trockelman*, Case No. 23130 (S.D. Ohio, December 7, 1966) (in bankruptcy).

36. While the point was not raised in the case under discussion, it has been decided that insurance proceeds arising on the destruction of a vehicle are not "proceeds" within the meaning of § 9-306. *Universal C.I.T. Credit Corp. v. Prudential Investment Corp.*, 222 A.2d 571 (R.I. 1966), noted in 65 MICH. L. REV. 1514 (1967). Based on the unvarnished language of § 9-306(1), the holding is not indefensible, but the result seems to be wrong. (The question whether insurance proceeds are proceeds within § 9-306 arises between a secured party and other creditors after those proceeds exist; it is not a matter of insurance law involving the rights of an insurer vis-a-vis third parties who may not be parties to the insurance contract. These are entirely different problems which arise in different contexts.) A collateral issue was raised in *In re Radabaugh*, 4 UCC Rep. Serv. 355 (S.D. Ohio 1966) (in bankruptcy), where it was held that the trustee in bankruptcy, rather than the secured party having an interest in the automobile, was entitled to an unearned automobile liability policy premium returned after bankruptcy when the policy was cancelled. In this case the referee said:

There is no evidence that this was a contract right under the policy of insurance

There are, however, two major impediments excluding this possibility. One is the *scienter* factor, to be discussed as to voidable preferences. Second, are the express terms of the Uniform Commercial Code in Section 9-204 . . . that a security interest cannot attach until the debtor has rights to the collateral. In this case, the bankrupt's rights to the fund involved did not arise until, at the earliest, the date of the casualty loss, which was within the voidable preference manifold.³⁷

While the referee states elsewhere in his opinion that if the insurance indorsement had been executed on the date of the security agreement, there would be no preference problem, this dictum seems to be quite beside the point on the referee's analysis. If in fact the collateral was the insurance proceeds, they arose only on destruction of the automobile, which was within four months of bankruptcy, and presumably they were not transferred before they arose. But was the right to the insurance payment the bankrupt's or the financier's? The former's according to the referee; the latter's according to the security agreement, supplemented by the late policy indorsement. Can a financier have a right to casualty insurance proceeds before they arise? They can, of course, be assigned in advance of loss, but the assignment is of nothing unless an insured loss occurs. It cannot matter to third party creditors, who know nothing of these backstage machinations and certainly could not be relying on getting insurance when they could not get the car, whether the right to insurance proceeds is transferred by the security agreement or by a separate assignment whenever executed. They could not have claimed the car and they should not be able to claim the insurance payment that is substituted for it.

involved, and therefore excepted from the operation of the Uniform Commercial Code as adopted in Ohio. See Revised Code § 1325.01(A). A security interest cannot attach until "the debtor has rights in the collateral," which occurred after bankruptcy. The account did not come into existence until the policy of insurance was cancelled. *Id.* at 357-58.

This is a curious analysis. In no sense could an unearned premium refund be called a "contract right," since that is a right to payment under a contract not yet earned by performance (§ 9-106), which is the opposite of the situation in the case; that is, the right to a return of unearned premium diminishes to zero as the insurer's liability continues over the life of the contract; a right to a refund is not "earned by performance." Nor could this be an "account" since it is not a right to payment for goods sold or leased or for services rendered (§ 9-106); it is a "payment" for services not rendered, perhaps, or a payment in lieu of rendering service in a sense. The statutory reference appears to be meaningless, since it is to the former Assignments of Accounts Receivable Act, which was repealed when the Code became effective in Ohio on July 1, 1962. PAGE'S OHIO REVISED CODE, Tit. 13, Amended Senate Bill No. 5, § 2, p. XX (1962). While the security agreement gave the secured party the right to cancel any insurance policy, which right was exercised, and the right to collect the "return premium," the right to the unearned premium was not included in the description of collateral. This is not surprising because § 9-104(g) provides that article 9 does not apply "to a transfer of an interest or claim in or under any policy of insurance." PAGE'S OHIO REVISED CODE, Tit. 13, § 1309.04(F) (1962). This provision was not cited in the Referee's opinion.

37. *In re Trochelman*, Case No. 23130 (S.D. Ohio, Dec. 7, 1966) at 4 (in bankruptcy).

The referee notes that the law of voidable transfers must be changed by Congress rather than the state legislature, which is unexceptionable, and observes that "To hold otherwise avoids the plain implications of the decision of the Supreme Court in *Corn Exchange Bank v. Klauder*, 318 U.S. 434 (1943) that the Chandler Act of 1938 resolved the doctrine of relation back."³⁸ Whatever else it may have involved, *Corn Exchange Bank v. Klauder* did not involve the doctrine of relation back and the bankruptcy result involved in that case was, as is well known, subsequently reversed by a change in the applicable *state law*.³⁹

Any relation between the facts in the instant case and those of *In the Matter of Portland Newspaper Publishing Co., Inc.*,⁴⁰ which involved constantly changing accounts, is not apparent to at least one observer. Still we are told:⁴¹

In that case [*Portland*] it was urged that after acquired accounts receivable were not transfers within four months of bankruptcy because of the combined force of the unitary theory and the theory of substituted collateral . . . Such mental gymnastics has the practical effect of destroying the concept of voidable preferences, incorporated in bankruptcy jurisprudence.

. . .

The implicit problems in commercial practice as to inventory and receivable financing and the necessity of identification is (*sic*) only a fraction of the problems under the voidable preference juristic manifold. A semantical definition of antecedent debt has not really changed the problem, because the problems implicit in identifications are not the same as the problems of antecedent debt.

Some further effort is given to demonstrating that the "transfer" of the insurance proceeds was not made within "a reasonable time" after the security agreement was executed. This is not, of course, the kind of situation to which section 9-108 applies.

Section 9-108 states:

Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his

38. *Id.*

39. *Corn Exchange Bank v. Klauder*, 318 U.S. 434, 436 n.6 (1943).

40. 4 CCH Inst. Cred. Guide ¶ 98,483 (D. Ore. Feb. 9, 1966) (in bankruptcy) [hereinafter cited as *Portland*].

41. *In re Trochelman*, Case No. 23130 (S.D. Ohio, Dec. 7, 1966) at 4 (in bankruptcy).

rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given.

Contrary to the Referee's opinion, this section does not in any sense destroy the concept of voidable preferences. It simply states what, on any fair and reasonable basis, most non-bankruptcy specialists would assume to be the correct law, aside from the actual practice. It applies basically to changing collateral, formulating the concept that the simplest way of carrying out a secured transaction in accounts or inventory is also a legally safe method. It states the theory, as a Code properly should, to sustain a stationary, rather than the admittedly invulnerable revolving,⁴² loan on changing collateral. It does not, nor could it, provide a theory to sustain in bankruptcy a security interest in non-replacement equipment coming in within four months of bankruptcy and covered by an after-acquired property clause where the consideration is clearly antecedent.

The *Portland* case⁴³ furnishes the most eloquent apologia for the anti-Commercial Code, anti-secured transaction bias of so many referees. Referee Snedecor pointed out:⁴⁴

The old-fashioned method of operating a business on the strength of equity capital and unsecured bank credit based upon the financial integrity of the debtor seems to be giving way to the modern trend of financing business operations in reliance upon a floating lien on current assets with little or no regard for equity capital. Added to this is the more recent development of leasing, rather than owning, plant and equipment. These methods leave the daily suppliers and employees in a perilous position.

No statute makes the validity of secured financing devices depend on a referee's approval of them socially or economically. So long as they

42. See *In re New Haven Clock & Watch Co.*, 253 F.2d 577 (2d Cir. 1958).

43. 4 CCH Inst. Cred. Guide ¶ 98,483 (D. Ore. February 9, 1966) (in bankruptcy). Analyses of the issues involved may be found in Krause, Kripke, and Seligson, *The Code and the Bankruptcy Act: Three Views on Preferences and After-Acquired Property*, 42 N.Y.U.L. REV. 278 (1967); Henson, *The Portland Case*, 1 GA. L. REV. 257 (1967). According to Mr. Krause, who was for many years chairman of the Commercial Bankruptcy Committee of the American Bar Association Section of Corporation, Banking, and Business Law, "Notwithstanding Referee Snedecor's position, the Code provisions may be sustained on several grounds." Krause, *supra* at 281. One of Professor Kripke's more laudatory comments on the *Portland* case was that the opinion was "completely mechanical and wooden." Kripke, *supra* at 287. My own response to the *Portland* case and others of its ilk was to suggest that our bankruptcy system needs to be re-studied, with a view towards abolishing the present referee system. Henson, *supra* at 266. The possibility of substituting an administrative agency for the present system was suggested by the Chief Justice several years ago when he became rightly concerned about the excessive costs of bankruptcy administration. See Warren, *Address*, 37 REF. J. 3, 4-5 (1963).

44. *Portland*, 4 CCH Inst. Cred. Guide ¶ 98,483 at 89,073 (D. Ore., Feb. 9, 1966).

are carried out in accordance with applicable state law and do not offend a specific provision in the Bankruptcy Act, as distinguished from a referee's "philosophical" concept of the Bankruptcy Act, the transactions are entitled to proper enforcement. Even the Supreme Court of the United States learned in the 1930's that its economic views were not immutable Constitutional doctrine.

The alleged conflict between section 9-108 of the Code and section 60a of the Bankruptcy Act is simply a conflict created by commentators (including referees). If a reasonable accommodation can be presented, there is no conflict unless someone wishes to make one. The reason for creating a conflict is to permit setting aside those secured transactions involving changing collateral not handled on a revolving basis, presumably to benefit unsecured creditors,⁴⁵ although some critics of bankruptcy administration have suggested that the principal beneficiaries are those who share in the costs of administration.⁴⁶

One of our most respected federal judges has found no conflict between the Code and the Bankruptcy Act, and in a landmark opinion, the most sophisticated opinion yet written in a Code case, Judge Ford of the Federal District Court in Massachusetts has upheld section 9-108 in bankruptcy.⁴⁷ The collateral was changing inventory and accounts; the facts presented the same conceptual problems as the *Portland* case.

Recognizing that the crux of the preference problem under section 60 was when the "transfer" took place, Judge Ford quoted the pertinent provision in section 60(a)(2):

45. The Referee in *Portland* appeared to be particularly concerned about the wage claimants who were, as a matter of fact, strikers while the secured creditor of Code importance was a corporation composed of 88 labor unions and organized for the purpose of helping the strikers. *Portland*, *id.* at 89,058, 89,073. It has been pointed out, with appropriate supporting statistics, that in 1965 for manufacturing corporations almost twice as much credit was furnished by financing institutions as was furnished by "trade creditors," *i.e.*, 19.7% versus 10.7%, while for all corporations the percentages were 29.9% versus 9.8%, and of course trade creditors in turn often sell or assign their receivables for financing. See Brief Amicus Curiae of the Permanent Editorial Board for the Uniform Commercial Code, appeal from the Order of the Referee dated February 9, 1966, filed in the *Portland* case, pp. 8-11. The *Portland* case furnished another instance of a referee taking a partisan stand in favor of unsecured creditors in disregard of the law and of the economic facts of life.

46. For the fiscal year ended June 30, 1966, the costs of administration in asset cases averaged 24.8% of total realization. The average realization per case was \$5,363. Trustees' commissions amounted to 3.4% of the total realized and attorneys for trustees received 7.1% of the total. See Administrative Office of the United States Courts, *Tables of Bankruptcy Statistics*, Table F7 (1967). As an example of You Can Prove Anything By Statistics, administration fees and expenses amounted to only 7% of proceeds realized in the Virgin Islands, while they amounted to 37.6% in the Northern District of Oklahoma; but in dollars, this amounted to an average of \$12,076 per case in the Virgin Islands (where only two asset cases were concluded during the year) and only \$430 in Oklahoma. *Id.*, Table F5.

47. *Rosenberg v. Rudnick*, 262 F. Supp. 635 (D. Mass. 1967). In view of this case, it was perhaps premature for one commentator to remark on the basis of the *Portland* case: "The 'floating lien' conceived by the Commercial Code is now worthless in bankruptcy." Wolson, *Keeping Current*, 72 *COM. L.J.* 72 (1967).

For the purposes of subdivisions (a) and (b) of the section, a transfer of property . . . shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee.

He then noted that "the question of when the requisite perfection has been reached is one which must be determined by the applicable state law . . .,"⁴⁸ that is, by the Uniform Commercial Code. Judge Ford then stated:⁴⁹

Trustee relies on § 9-303 which provides: "(1) A security interest is perfected when it has attached and when all the applicable steps required for perfection have been taken. * * * If such steps are taken before the security interest attaches, it is perfected at the time when it attaches." § 9-204(1) provides that: "(1) A security interest cannot attach until * * * the debtor has rights in the collateral * * *" (It is stipulated here that by filing the security statements Rudnick took all the applicable steps required for perfection.) A first literal reading of these provisions would seem to support the trustee's contention. However, § 60(a) (2) does not make the test one of when the state law may denominate a security interest as perfected. The specific test of § 60(a) (2) is one of when under state law the security interest, however described, becomes one which cannot be defeated by a subsequent lien obtainable in proceedings on a simple contract action. Perfection under state law need not be full perfection but only perfection *so far* as is necessary to meet the test of § 60(a) (2). While the Massachusetts law may not regard a security interest in after-acquired inventory as fully perfected until it attaches to items as they are acquired by the debtor, nevertheless § 9-204(3) recognizes that a lien in such inventory items can be validly created by a security agreement. Such a lien, after proper compliance with the filing provisions, is superior to a subsequently acquired contract creditor's lien or other claims of third parties except the rights of buyers in the ordinary course of business under § 9-307(1) and holders of perfected purchase money security interests under § 9-312(3). In this case the security interest was created by the execution of the security agreement on April 30, 1962 and the subsequent compliance with the filing provisions. As of that date the security interest met with the requirements of § 60(a) (2) and the transfer must be regarded as having taken place on that date.

Judge Ford next quoted section 9-108 of the Code and stated that this section would produce the same result in the case at issue. He ob-

48. *Rosenberg v. Rudnick*, 262 F. Supp. 635, 638 (D. Mass. 1967).

49. *Id.*

served that the Bankruptcy Act itself does not define antecedent debt and that, in view of the almost universal adoption of the Code, ". . . the definition of § 9-108 should be regarded as generally accepted and in accord with current business practice and understanding and hence applied in bankruptcy."⁵⁰

Because of the extreme importance of the point at issue and its resolution, a further extensive quotation is justified:⁵¹

Plaintiff's contentions are based on the view that the liens under the security agreement should be considered as attaching separately to each distinct item included in the inventory. In applying § 60, however, inventory subjected to a security interest should be viewed as a single entity and not as a mere conglomeration of individual items each subject to a separate lien. "In other words, the *res* which is the subject of the lien . . . is the merchandise or stock in trade, conceived of as a unit presently and continuously in existence—a 'floating mass', the component elements of which may be constantly changing without affecting the identity of the *res*." *Manchester National Bank v. Roche*, 1 Cir., 186 F.2d 827, 831. The security interest is in the entity as a whole, not in its individual components, and the transfer of property occurs when this interest in the inventory as an entity is created. *Matthews v. James Talcott, Inc.*, 7 Cir., 345 F.2d 374, 380.

The transaction here was not one of those which the provisions of § 60 were designed to avoid. There was nothing here in the nature of a secret lien. There was no attempt by one creditor to outrace others at the last moment before bankruptcy. Defendant here bargained for and acquired his security interest at the time he made his loan. The statutory provisions for notice filing were fully complied with. No supplier who sold merchandise on credit to Boyle can justifiably claim he relied on the appearance of Boyle's inventory. He could easily have determined the extent of Rudnick's interest in it, and could have protected himself, if he so wished, either by perfecting a purchase money security interest under § 9-312(3), or, as some suppliers did, by getting Rudnick to guarantee payment.

The conclusion must be that in the transaction involved here the transfer from Boyle to Rudnick took place on April 30, 1962, contemporaneously with the creation of the debt secured and more than four months before the filing of the bankruptcy petition, and therefore there was no preference within the meaning of § 60 of the Bankruptcy Act.

This opinion merits the highest praise. It solves a legal problem in

50. *Id.* at 639.

51. *Id.*

line with a statute passed by 49 states (and by Congress for the District of Columbia and also by the Virgin Islands), and it solves it in line with an ordinary businessman's understanding of this kind of financing. Law is not for lawyers; it is designed for social control. In the case of the Code, it was drafted to cover commercial transactions in line with modern concepts. Judge Ford's opinion lays to rest the view that there cannot be an accommodation between the Code and the Bankruptcy Act.⁵² If an eminent judge says they are compatible, they are. And no amount of disagreement can undo what he has done.

IV

Far too many opinions by referees show a clear, unjudicial bias against secured credit⁵³ and especially against certain secured transactions clearly authorized by the Uniform Commercial Code. This may be looked upon by some as an amusing antic, a judicial "Last Hurrah"; but it need not and will not be tolerated. There is no intellectual, economic, or legal excuse for it. The time has come for an open-minded re-examination of the function of the bankruptcy courts of this country.⁵⁴ A study

52. The National Bankruptcy Conference, a very small, self-perpetuating group which appears to be influential despite its unofficial status and a certain amount of criticism, is engaged in redrafting § 60 of the Bankruptcy Act. See Kripke, *The Code and the Bankruptcy Act: Three Views on Preferences and After-Acquired Property*, II, 42 N.Y.U.L. REV. 284, 291 (1967). Professor Gilmore, who was one of the draftsmen of art. 9, is working on this new project, which adds hope to promise. As someone has pointed out, from the standpoint of verbal compatibility § 60 might as well have been drafted in Arabic and § 9-108 in Hebrew.

53. This bias is not restricted to secured credit. Loans aggregating billions of dollars have been made on a contractual subordinated basis with no security, and yet a referee in New York decided that these contracts were enforceable only in situations where superior creditors relied on them. He would rewrite the contract the parties made and give subordinated creditors funds in the very circumstances where they had agreed not to accept them; that is, at the time when the superior creditors were clearly entitled to them. In reversing the district court, which had upheld the referee, the Court of Appeals stated:

The district court sought support for its position in an article of which the bankruptcy referee involved here, Asa A. Herzog, was a co-author, Herzog & Zweibel, *The Equitable Subordination of Claims in Bankruptcy*, 15 VAND. L. REV. 82 (1961), wherein the opinion is expressed that the concept of "estoppel to subordinate" should be utilized only where a creditor relies on a subordination agreement. *Id.* at 92. The sole authority cited by the authors in support of their position is *Bird & Sons Sales Corp. v. Tobin*, 78 F.2d 371 (8th Cir. 1935) which, in their words, "pointed in that direction . . ." 15 VAND L. REV. *supra* at 92 n.69.

In re Credit Industrial Corporation, 366 F.2d 402, 409 n.2 (2d Cir. 1966). In this instance, the referee was willing to upset a widely used financing mechanism, whose enforceability had never really been open to doubt, in order to lend authority to an unsupportable theory of his own devising. See Leiby, *Subordination and the Uniform Commercial Code: Enforcement and the UCC*, 23 Bus. Law. 57 (1967).

54. It is a regrettable comment to have to make, but while criticism of the Supreme Court or practically any court is considered fair, few lawyers will publicly criticize bankruptcy courts. Having made at many bar association meetings some of the criticisms made in this paper, I am aware that many lawyers agree with my comments but are afraid to make them—afraid because they must appear before the referees they would like to criticize; and their complaints are responsible. This is a serious charge to lay at our lowest federal courts, but the problem persists and it will not go away by ignoring it. We need to know more about the "bankruptcy ring" and how it operates. We need to know so much more

in depth may well recommend abolishing the present system in favor of an executive agency which would be especially qualified to handle relief for consumers but which could well do a more efficient and less expensive job of administering bankruptcy for all of those who need it.

It is not acceptable in these times for courts, any courts, to thwart the expressed purposes of a modern commercial law. The Uniform Commercial Code is too important to the economy of our country for judicial disagreement with its aims to be manifested in clearly wrong decisions. This is a fast, new age; it demands new thinking. When the Code has been enacted by a legislature, it should be interpreted as the Code's sponsors intended, unless a legislature has made an amendment to achieve a different result, and we may hope that local amendments will be held to a minimum. We need a *uniform* commercial law in this country at this time. We have the Uniform Commercial Code. It should be allowed to operate as it was intended to operate in order to give this country the kind of law that 51 jurisdictions felt that they needed when they enacted it.

ADDENDUM

Since this article was written, the United States District Court for the District of Oregon has reversed the referee in the *Portland* case⁵⁵ on the significant Code issues with which we are here concerned.⁵⁶ Because the referee's opinion reflects the outlook of many referees and bankruptcy specialists, the commentary on the case is left unchanged, but some points from Judge Solomon's opinion must be mentioned.

It was clear that Judge Solomon was greatly influenced by Judge Ford's opinion in *Rosenberg v. Rudnick*.⁵⁷ After several quotations from that opinion, including Judge Ford's view that financed inventory should be considered as an entity, Judge Solomon said, "I agree with Judge Ford's decision."⁵⁸ He found "nothing either illegal or illogical in the arrangement sanctioned by the Code"⁵⁹ for a continuing security interest in changing collateral. Moreover, "Without a clear-cut conflict, UCC § 9-108 should not be held to contravene Section 60. I find no such conflict."⁶⁰

about so many things in this area. Clearly problems vary in different sections of the country; but that serious problems exist and pervade the bankruptcy system is not subject to doubt. See *Cleveland Plain Dealer*, November 9, 1963 at 1, col. 2; *Dun's Review and Modern Industry* 35, 68 (March 1963). See also M. MAYOR, *THE LAWYERS* 409-414 (1967).

55. 4 CCH Inst. Cred. Guide ¶ 98,483 (D. Ore February 9, 1966) (in bankruptcy).

56. In the Matter of Portland Newspaper Publishing Co., 271 F. Supp. 395 (D. Ore. 1967). The score is now 3 to 0 in the Federal District Courts. See In The Matter of White, No. 46,711 (S.D. Ohio, Oct. 30, 1967) (reversing the referee).

57. 262 F. Supp. 635 (D. Mass. 1967).

58. In the Matter of Portland Newspaper Publishing Co., 271 F. Supp. 395, 400 (D. Ore. 1967).

59. *Id.*

60. *Id.* at 60.

Judge Solomon succinctly stated a guiding principle behind the Code: "Good business practice should be good business law."⁶¹

Now that two eminent judges have led the way, we may hope that the issue of section 9-108 versus section 60 has been laid to rest.

61. *Id.*